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Who are Judicial Decisions Meant For? The 'Global Community of Law' in Southern Africa

Abstract

Rationalist models of judicial decision-making expect courts to defend their institutional integrity in politically sensitive cases. This article presents two African case studies of courts not doing so. They have elicited predictable backlash from executives and placed their institutions in avoidable danger. I argue that judges' desire for esteem from emerging global judicial networks can explain this otherwise puzzling behaviour. These new networks become particularly salient in human rights cases. This conclusion partially supports Anne-Marie Slaughter's controversial claims about the significance of 'the global community of law' but also identifies risks this poses for courts' domestic authority. The argument is made with reference to two recent and well-known decisions by the High Court of Botswana and Southern African Development Community Tribunal. The first case, *Sesana* (2006), dealt with the vexed question of indigenous rights in Africa. The second case, *Campbell* (2008), concerned the compensation of expropriated commercial farmers from Zimbabwe.

Key words

Constitutionalism, judicial politics, human rights, judicial networks, Botswana, Zimbabwe.

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Introduction*

Ours is an age of 'judicialisation': the spread and empowerment of constitutional and international courts across the globe. In new democracies, especially, courts have been remarkably successful in expanding their activity without provoking backlash from political elites. How judges have been able to do so represents a puzzle for political scientists. 'Strategic models' typically solve it by highlighting judges' political savvy (see introduction to this special issue). By being attentive to government's wishes, and carefully crafting their rulings to minimise confrontation, they have gradually eroded executive privileges. As one scholar puts it, even the 'credible threat' of backlash from the executive produces a 'chilling effect on judicial decision-making patterns […] who says Supreme Court judges are not shrewd political animals?' (Hirschl 2008: 98).

In this study, by contrast, I show how some courts have paid more attention to signals from global judicial networks, than to those emanating from the executive. They have also paid a price for doing so: political backlash undermining their institutional integrity. Some other scholars, it is true, have also challenged orthodox beliefs about new courts' prudential deference (Helmke and Staton, 2011: 306, 325-6). But they continue to assume that courts always defend their institutional interests, using rational choice assumptions to generate a more complex set of trade-offs confronting judges. Constitutional adjudication, they argue, is a repeated game. Deferential strategies ultimately provide litigants with incorrect information about the court's real preferences. This, over the long-term, lowers the court's use, undermining the institution. Risking

backlash may therefore, on occasion at least, be a rational choice (Helmke and Staton, 2011: 317-8). In what follows I question these widely-held assumptions about institutional interests. In neither of my case studies did judges act as 'shrewd political animals'. Courts effectively chose to put themselves in danger by signalling to their global networks. Strategic trade-offs cannot explain the risks they took.

I make this argument using two highly controversial southern African human rights cases. *Sesana* (2006) was an indigenous rights case at the Botswanan High Court, whilst *Campbell* 2008 saw expropriated Zimbabwean farmers seek redress from the Southern African Development Community (SADC) Tribunal[1]. (The latter poses a particular challenge for repeated game theorists: subsequent backlash saw the tribunal stripped of individual access rights after its first case of any significance.) Both cases, I suggest, constitute qualified evidence for the importance of something whose significance political scientists generally downplay: Anne-Marie Slaughter's (2003: 211) 'global community of law' (cf. Black and Epstein, 2007). This 'community' is a classic case of an informal between-bench network (see special issue introduction). It is comprised of judges who conceive of themselves as 'autonomous actors forging an autonomous relationship with their foreign or supranational counterparts' (Slaughter, 1994: 123). 'Mutual recognition as participants in a common enterprise', Slaughter argues, characterises relations between constitutional courts in a 'widening community of liberal states', including new democracies (Slaughter, 1994: 131-2). This network straddles issue areas, legal traditions, levels of jurisdiction, and older transnational forms of inter-judicial recognition (such as those within the Commonwealth). Judges

use it to exchange information and build a 'global legal system' (Slaughter, 2004: 100, 243). This horizontal 'dialogue' is both face-to-face (at a growing number of global inter-judicial conferences) and at a distance (via the increasingly common practice of courts citing foreign decisions) (e.g. Slaughter, 2003: 192; 2004: 51, 65).

Recent judicial politics scholarship has treated appeals to global judicial networks as 'instrumental' attempts to boost credibility and thus 'ensure compliance' or 'secure material resources' (e.g. Garoupa and Ginsburg, 2015: 3, 171-2). The 'global community of law' is, however, (dangerously) irreducible to such instrumental calculus. Its emergence need not therefore advance the institutional interests of courts in new democracies (contrast Ginsburg and Garoupa, 2015: 168). Judges, as Baum (2006: 25) argues, 'are people'. Like us they want to be 'liked and respected by others who are important to them'. Loyalties and affinities, even transnational ones, are thus not necessarily subservient to domestic strategic imperatives. And this holds wherever ties are situated on the continuum from the material to the ideational (see special issue introduction). Flanagan and Ahern's (2011, 34) survey of common law judges in constitutional rights cases found that the 'aspiration to membership of an emerging international 'guild'' was a more important motivation for citing foreign law than the participation in a common jurisprudential enterprise hypothesised by Slaughter. My case studies support this conclusion. They also highlight the potential for unmanageable tensions between the cultivation of reputation in global judicial networks and the steady acquisition of domestic political authority, particularly where regimes' basic legitimations prove incompatible global human rights scripts. The next two sections

justify my method and case selection, and are followed by analyses of first *Campbell* and then *Sesana*.

Method

This is a plausibility probe. Its overriding objective is to establish that judges *can* act against their institutional interests. *Some* judges have certainly behaved as if non-instrumental appeals to global networks have trumped the 'chilling effects' of executive signalling. They do not so as a rule. This methodological caution partially reflects 'the inherent limits in our understanding of the forces that shape judicial behaviour such as judicial decisions', and the corresponding requirement that claims about them be 'expressed in indefinite terms' (Baum 2006: 173-4). But it is also justified by continued scepticism surrounding the relevance of the 'global community of law' for empirical scholarship. My contribution to this debate seeks to indicate areas where Slaughter's conclusions still merit further testing.

Slaughter has, notably, been justly criticised for lacking methodological and conceptual rigour (cf. Meierhenrich, 2009). She does not specify how her object can be measured or identified, and neglects social network analysis tools. Some of her critics maintain that inter-judicial communication remains largely confined to networks created during legal education and training (Law and Chang, 2011: 529-530). Transnational 'dialogue', when it exists, is more often monologue. On Slaughter's (2004: 74) view, for example, the Canadian Supreme Court and South African Constitutional Court 'have

both been highly influential' in promoting the citation of foreign decisions. Yet by Law and Chang's (2011: 532) reckoning the South African court actually cites its Canadian counterpart almost three hundred times more often than the inverse. Others critics wonder if 'the global community' is not limited to 'particular class[es] of recent decisions', such as human rights cases (Black and Epstein, 2007: 796-7). Whilst still others query how Slaughter's points could be proved. 'What', for example, 'are the measurable consequences of international conferencing?' (Meierhenrich, 2009: 87). Most judges consider such meetings opportunities for 'small talk' (Law and Chang, 2011: 567). And the mere 'impressions of a random and unrepresentative sample of judges' do not suffice to establish general trends (Meierhenrich, 2009: 88).

It is true, firstly, that like Slaughter (1994: 130; 2003: 194-7; 2004: 69-79) I deploy judges' own words as evidence[2]. My interpretations, however, are not intended to 'prove' any rival theory, but merely to indicate why the cultivation of esteem in global judicial networks is a particularly plausible alternative to rationalist explanations (see also Kersch, 2009: 96). Whenever possible I use a now orthodox method among legal historians to guide these interpretations: prioritising off-bench statements without immediate implications for ongoing cases (see Sharafi, 2007: 1080-1081). As long highlighted by 'strategic models' of judicial decision-making, judges' political attitudes and value preferences cannot be straightforwardly inferred from their words or actions in the courtroom. Imperatives specific to legal institutions must always supervene. My attempted reconstructions of judges' understandings of their role in international relations thus supplement analyses of *dicta* and opinions with interview material and

even a novel written by a judge (compare Kersch, 2009).

I also accept, secondly, that human rights cases may be unrepresentative. Slaughter herself (1994: 132) even admits that global networking is 'particularly potent in the human rights field' (for supportive survey evidence Flanagan and Ahern 2011, 14). The scope of my argument is therefore limited to this class of decision alone. And I concede, thirdly, the unevenness of engagement with transnational networks. The South African Constitutional Court is indeed an unusual institution. It was deliberately created outside the ordinary courts system in order to insulate it from the automatic promotion of old-order judges. Its prolific citation of foreign courts, meanwhile, was explicitly encouraged by Section 35(1) of the South African constitution; a provision drafted, in Slaughter's (2004, 73-4) terms, as a 'badge of legitimacy' for the post-apartheid state. Flanagan and Ahern's (2011, 15) surveys indicate, similarly, that judges who hold their foreign counterparts 'in higher professional esteem than [domestic] subordinates', are most likely to cite them. My own Southern African case studies are intended to provide (dramatic) additional indications of how the 'global community of law' may exercise particular influence over judges aspiring to membership of an international 'guild'.

A Tale of Two Courts

Two features of my case studies make them particularly suitable for probing the plausibility of the claim that judges do not systematically prioritise courts' institutional integrity. In both cases, firstly, executive preferences could not have been clearer or

stronger. Both were examples of what Hirschl (2008) calls 'the judicialisation of mega-politics'; the most striking of all recent expansions of higher court activity. Adjudicating 'such matters is an inherently and substantively political exercise', and may involve 'judicial scrutiny of executive-branch prerogatives in the realms of macroeconomic planning or national security … [and] electoral processes'. Most dramatic of all, however, has been 'the judicialisation of formative collective identity, nation-building processes, and struggles over the very definition or raison d'être of the polity as such': an 'involvement in the political sphere beyond any previous limit' (Hirschl, 2008: 98-9). (Famous examples include the Israeli Supreme Court's ruling on *which* Judaism is referred to by the country's constitutional self-definition as a 'Jewish and democratic state', and the Canadian Supreme Court's 1995 ruling that unilateral Quebecois secession would be illegal even following a majority vote.) Courts, in both my cases, directly challenged the central legitimation strategies of parties ruling since independence.

In both cases, secondly, legal commentators agree that judges could have adjudicated in ways less threatening to the executive. They had room for manoeuvre. But executive signalling, inevitable given the political stakes, failed to elicit the 'shrewd' political behaviour anticipated by assumptions about judges' institutional interests. By behaving as if they were signalling to global judicial networks, courts provoked easily predictable (and widely predicted) forms of backlash – state responses that VonDoepp and Ellett (2011: 152) characterise as 'general institutional assault[s]'. This was most marked in *Campbell* (from Zimbabwe), which resulted in fundamental

institutional restructuring. In *Sesana* (from Botswana), by contrast, backlash only took the form of 'deliberately failing to abide by court rulings or bypassing judicial institutions' - notwithstanding speculation about the ruling's effect on judicial appointments (see VonDoepp and Ellett, 2011: 152).

It should be noted, finally, that I make this argument about both an international and a domestic court. Traditionally scholars have assumed that international courts are less constrained politically, and so we might already expect them to be attentive to ideational networks. Empirical analysis has shown, however, that such contrasts are 'overstated' (Ginsburg, 2015: 486). States retain numerous control mechanisms. Younger and weaker international courts, meanwhile - like the SADC Tribunal - have been shown to be especially sensitive to state preferences (e.g. Madsen 2007; contrast 'politically powerful' international courts in Alter, 2014: 281).

Campbell v Republic of Zimbabwe (2008)

My first case precipitated perhaps the most dramatic backlash against an international court in recent history: southern African states stripping the SADC Tribunal of its individual access rights (Alter, 2014: 58). Their ferocious reaction is only comprehensible once the significance of *land* for collective identity in Zimbabwe and southern Africa has been understood (contrast Nathan, 2013, stressing sovereignty).

In 1978 40 per cent of land in Zimbabwe (then Rhodesia) belonged to white

farmers. Less than 4 per cent of the population were white. Africans could not own land privately (see Alexander, 2006: 83-104). In 1980 the country's national liberation movements acceded to a democratic transition significantly below their initial expectations. Zimbabwe's independence constitution entrenched property rights for 10 years, whilst the decade that followed saw a series of administrative orders gazetting land defeated in the courts on procedural grounds. These cases were usually funded by a Commercial Farmers Union (CFU) legal defence fund established for the purpose (e.g. Pilossof, 2012: 33-4). Some ruling-party technocrats then complained that the higher courts were imposing overly-restrictive conditions on land redistribution (e.g. Alexander, 2006: 181).

By the late 1990s, however, ZANU-PF (Zimbabwe African National Union - Patriotic Front, the ruling party) faced economic crisis and a serious electoral threat. Faced with becoming the first ex-liberation movement in the region to lose power, it abandoned its self-presentation as a modernising regime committed to rational-legal norms. In their place it adopted a (not wholly unsuccessful) anti-colonial legitimation strategy commonly labelled 'patriotic history'. This encouraged the forcible expropriation of commercial farmland - no longer considered as simply a national economic asset - and justified authority in rural areas on nationalist and (in places) patrimonial grounds. Court rulings against these expropriations were ignored, but retrospectively rationalised via legislation (Alexander, 2006: 180-198).

It was the most significant of these legislative rationalisations - the Constitutional Amendment Act No.17 (2005) - that finally separated the CFU from a significant constituency of farmers. Return to expropriated farms was now explicitly forbidden. And the CFU was no longer willing to mount legal challenges in the Supreme Court, whose bench had been dramatically overhauled after ruling in farmers' favour (Pilossof, 2012: 54-5). A splinter group led by English-born Ben Freeth began challenging the expropriation of their farms, and land reform as a whole, internationally. First they exhausted domestic remedies. They challenged the constitutionality of Constitutional Amendment Act No.17 in the Zimbabwean courts, fully expecting (correctly) to lose (David Drury, interview, Harare, 4th April 2012; Ben Freeth, interview, Harare, 5th April 2012). By doing so, however, they were able to bring the case before the soon-to-be-opened SADC Tribunal in Namibia; one of a new generation of African international courts allowing individual petition (Alter, 2014: 82-84).

The *Campbell* case in Windhoek centered around three issues: 1) the legality of a clause in Amendment 17 ousting court jurisdiction, 2) the necessity for farmers to be compensated at a 'fair' rate, and 3) the question of whether Fast-Track Land Reform (FTLR) as a whole amounted to racial discrimination. This last point was, of course, a direct challenge to 'patriotic history', and a dramatic illustration of Hirschl's (2008) 'judicialisation of mega-politics'. When the case was heard in July 2008 the Government of Zimbabwe (GOZ) tried, repeatedly, to delay proceedings. Eventually Judge President Luis Antonio Mondlane dismissed these attempts, declaring that 'we

are trying to build a house of justice in this region'; a statement later interpreted as evidence of the tribunal's wish to be to be esteemed by the 'global community of law' (e.g. Gauntlett, 2010). Dramatically, however, this decision to adjudicate the case prompted the GOZ's lawyers to walk out of court.

This clear 'signalling' of executive preferences might have been expected to produce a 'chilling effect'. The tribunal's mandate, notably, had left the SADC Summit of member states entirely responsible for enforcement: free to determine if the tribunal would become a paper tiger. Nonetheless, to the GOZ's dismay, the court still rejected its assertion that FLTR constituted a legitimate 'public purpose' in the special circumstances of a post-colonial state, reasoning that:

> 'we wish to observe here that if: (a) the criteria adopted by the respondent in relation to the land reform programme had not been arbitrary but reasonable and objective; (b) fair compensation was paid in respect of the expropriated lands, and (c) the lands expropriated were indeed distributed to poor, landless and other disadvantaged and marginalized individuals or groups, rendering the purpose of the programme legitimate, the differential treatment afforded to the Applicants would not constitute racial discrimination' (in Zongwe, 2009: 23).

Contrary to assumptions of deference on weak courts, only on *remedies* did the tribunal cater (somewhat) to the executive (see Alter, 2014: 60). The GOZ was merely 'directed to take all necessary measures through its agents to protect the possession, occupation

and ownership of the lands of the Applicants'. It was not required to do the (now) impossible, and 'restore the rule of law in commercial farming areas', as had been ordered to by the Zimbabwean Supreme Court in 2001 (see Pilossof, 2012: 54).

Backlash

This cautious approach to remedies, however, did not insulate the court from backlash. Almost immediately the GOZ began arguing that the tribunal was illegally constituted because the relevant protocol of the SADC Treaty had not been ratified. In 2010 the SADC Summit of Heads of State agreed to temporarily suspend the tribunal and review its competences. Then, in 2012, after rejecting official recommendations that the court's powers actually be reinforced, the summit decided that individuals could no longer access the tribunal. Despite condemnation from such groups as the International Commission of Jurists (ICJ), and moral authorities such as Desmond Tutu, numerous Zimbabwean and SADC political leaders used the occasion to question the tribunal's very right to rule on the land question (Nathan, 2013: 877-9, 884-5).

Analysis

One of the most striking aspects of *Campbell* was the relative ease with which such (predictable and indeed predicted) backlash could have been avoided by legal means. The ruling was hardly dictated by the 'letter of the law' (compare Alter, 2014: 281). The court simply granted itself jurisdiction by pointing to a (rather vague)

insistence in the SADC's founding treaty that states 'shall act in accordance with the principles...[of] human rights, democracy, and the rule of law'. As conceded by the court's international legal assistant, 'conservative positivists may thus have problems with the approach taken by the Tribunal' (Musarurwa, 2010: 11). The court could, indeed, have decided to rule only on compensation and the ouster of Zimbabwean courts. However, after disagreeing until the day before the judgement, the majority eventually also ruled on racial discrimination (Zongwe, 2009: 22). As counsel Jeremy Gauntlett (2010) explained, 'a striking aspect of the SADC main ruling in Campbell was that it ruled on all three of the attacks - and sustained each. Often courts will not do that, if one is dispositive'.

This majority opinion continually, moreover, cited foreign judicial decisions. Courts seeking to boost their international reputation often do this 'to define their reference group', in this case the 'global community of law' (Garoupa and Ginsburg, 2015: 171). And the tribunal justified its ruling on the ouster of the Zimbabwean courts citing the European Court of Human Rights (ECtHR), Inter-American Court of Human Rights (IACHR), and the highest courts of the United Kingdom and South Africa: an apparently classic case of inter-judicial 'dialogue'. More controversially the tribunal also rejected the GOZ's claims that land expropriation could not be understood as an issue of human rights and racial discrimination. The distinctive nature of post-colonial agrarian reform, the GOZ argued, would always ensure that one racial group must be indirectly but disproportionately affected. Instead the tribunal accepted the applicants' invitation to treat racial discrimination as forbidden by *jus cogens*: a universally binding

norm of international law (for analysis Zongwe, 2009: 25).

By taking this approach the tribunal refused to legitimate its decision in the eyes of regional political audiences. A consolidating political consensus now held that land must not be regulated by dominant international norms. Since Zimbabwe's expropriations, it had become increasingly illegitimate to frame land as an issue of owners' (human) rights. Activist groups, led by former South African President Thabo Mbeki, had managed to successfully persuade legal and political elites that the land question had dangerously 'disappeared from public view', its place 'taken by the issue of human rights'. Even such liberal administrations as that in Botswana now endorsed these nationalist frames (Alden and Anseeuw, 2009: 110-2, 139-143, 169, 178; Nathan, 2013: 885).

The tribunal's approach to this question also contrasted with that preferred by the region's most prominent network of human rights activists. (With Zimbabwe Lawyers for Human Rights (ZLHR) as its central node, this network also includes the Southern African Litigation Centre (SALC) and the ICJ.[3]) These activists, certainly, have consistently behaved as 'shrewd political animal[s]'. Being outside Slaughter's 'global community of law', their decision-making has not been subject to the same pressures as the regional judiciary, even if they share value preferences. This network, for example, has studiously avoided the increasingly contentious questions of rights and racial discrimination raised by Amendment 17 of 2005, challenging only its ouster clause at the United Nations. They have also taken the same issue to the African

Commission on Human and Peoples Rights (ACHPR), where they have connections, and ZLHR observer status. In 2005 ZLHR even had seven cases lodged against the GOZ before the Commission, at a time when Zimbabwe had more cases against it than any other country. Under such circumstances framing land as international human rights would have almost certainly escalated Zimbabwe's (still low-level) resistance against the commission into full-blown backlash. And, in fact, the commission has long preferred to stress 'the colonial element of the Zimbabwe situation' (Murray, 2011: 188).

Perhaps unsurprisingly, therefore, when the *Campbell* farmers sought to appeal the Summit's restructuring of the tribunal to the African Court of Human Rights in 2013, the commission refused to pass the case on[4]. In rejecting this complaint, the commission was acting as the European Commission on Human Rights had in the 1960s and 1970s, when it built legitimacy for the ECtHR by shielding it from cases threatening member states' sovereign prerogatives (Madsen, 2007: 144-152). SALC, which had sought to dissuade the *Campbell* applicants from litigating, criticised the SADC Tribunal for not taking such a cautious approach towards safeguarding its institutional integrity. In 2013 its Director argued that 'the Tribunal shouldn't have handled such high impact and controversial cases from its inception but should rather have focused on building legitimacy in its rulings over matters which weren't as controversial' (SAFPI, 2013; also Lloyd Kuveya, interview, 3rd May 2012).

The five judges that ruled on *Campbell*, however, were not drawn from this

activist network[5]. No judges came from states where white populations retained the bulk of commercial farmland (Namibia, South Africa, and Zimbabwe). Only Onkemetse Tshosa, a Botswanan judge who dissented on the issue of racial discrimination, had any prior record of public engagement with these issues. He was even criticised by one Zimbabwean scholar for academic work 'understat[ing] the extent to which post-independent Zimbabwe has engaged in practices which violate international human rights law' (Zimudzi, 2002: 2). Judge Rigoberto Kambovo from Angola has some experience with inter-judicial networking, but only in the fields of maritime law and combating transnational crime. Judge Isaac Mtambo, from the Malawian Supreme Court of Appeal, was educated in Malawi and a former Director of Private Prosecutions who had climbed the domestic ranks. Charles Mkandiriwe, the court registrar, and ICJ commissioner, has however made it clear that he understood the problems the tribunal faced as analogous to those confronting regional courts elsewhere - especially the ECtHR and the East African Court of Justice (EACJ) - with whose staff he was in regular 'dialogue' (Charles Mkandiriwe, interview, Windhoek, 22nd August 2011). Certainly, under Judge President Mondlane - one of Mozambique's most senior jurists - dialogue with international courts became a tribunal priority. A year before *Campbell* it arranged visits for judges to the ECtHR, International Court of Justice, European Court of Justice, International Criminal Tribunal for Yugoslavia, Hague Conference on Private International Law; and networking in London with judges from another six international courts, including the Caribbean Court of Justice and two African regional tribunals (Hulse and van der Vleuten, 2015: 92-3).

In the case of Judge Ariranga Pillay from Mauritius, however, evidence for the influence of the 'global community of law' is somewhat less speculative. Deeply enmeshed in international human rights networks, Pillay has been a Vice-Chairman of the UN Committee of Economic, Social and Cultural Rights; a drafter of reports for the UN Committee for the Elimination of Racial Discrimination; a fellow in human rights at the University of London; and a regular speaker at international human rights conferences. He was also, perhaps unsurprisingly, the only judge to dissent on costs, declaring that the 'exceptional' nature of the case justified 'the award of costs to the applicants in the interests of justice'. Alone amongst his brethren, he has made public statements about the case since the judgement. In a 2011 interview, for example - delivered between speeches on the topic to the Law Society of Namibia and South African Constitutional Court Alumni Association - Pillay implied that the Tribunal had anticipated member states' reactions: 'It [the Tribunal] gave off all the right buzz words, you know, 'democracy, rule of law, human rights' … they [member states] got the shock of their lives when we said these principles are not only aspirational but also justiciable and enforceable' (see Nathan, 2013: 884). In 2013 he even reportedly declared that the Tribunal's 'demise was predictable and inevitable': clearly suggesting that executive signalling had been ignored (SAFPI, 2013). Pillay, finally, was dismissive of the growing regional consensus about land and rights, criticising Mauritius for siding with Zimbabwe when it didn't have any of 'the same historical hangovers' (Christie, 2011).

Sesana v The Attorney General (2006)

2006 saw dramatic confrontation between the government of Botswana and its High Court (then at the apex of the permanent judicial system). On the 13th December the Court ruled on the longest and most expensive case in the country's history. This lawsuit was also the most controversial, with Survival International, a British indigenous rights NGO, using it to condemn the human rights record of the government, hitherto seen internationally as a beacon of liberal democracy in Africa.

Historical context

Sesana centered around the relocation of 'indigenous' San populations from the Central Kalahari Game Reserve (CKGR); a policy pursued as part of a strikingly ill-informed civilising mission pursued by both colonial and postcolonial administrations. As early as 1890, indeed, the San, who neither lived in villages not owned cattle, had been 'consigned to a peripheral, wild, uncontrolled nature' in the ideology of the dominant Tswana ethnic group. This determination to 'settle' the San was only reinforced under late British colonialism, and with the spectacular developmental success of the post-colonial Tswana elite in the later twentieth-century (Wilmsen 2002, 829).

The immediate background to the case, however, related to a wave of relocations of San from the CKGR dating from mid-1997. In the previous year soon-to-be-President Festus Mogae had referred to CKGR inhabitants as 'Stone Age creature[s]' who 'must

change, or otherwise, like the dodo, they will perish'. The government's stated objective was to develop a new settlement for these 'nomadic' populations, equipped with social services. Almost immediately, however, controversy erupted over the adequacy of consultation, (promised) compensation paid, and alleged threats about the use of force (Zips-Mairitsch, 2013: 243, 306-312).

Between 1997 and mid-2001 a coalition of international and Botswanan NGOs attempted urgent negotiations with the government, advocating a new Management Plan for the Reserve. For reasons that are still hotly disputed, however, these negotiations had broken down by mid-2001. In October the government announced that game licenses would no longer be renewed, and services, including water, would no longer be provided for those who had returned to the CKGR. In January 2002 (armed) police and officials removed water storage tanks, closed the last remaining borehole, separated some families, and dismantled (sometimes bulldozing) property, relocating all but a few households to the new resettlement villages. The government blamed Survival International (SI) for this change of heart, reacting to a confrontational SI advocacy campaign that accused it of seeking 'conflict diamonds' in newly-vacated Reserve lands (Saugestad, 2011: 41-45).

Sesana

The San's NGO supporters were now left with no choice but to litigate a dispute striking at the heart of 'formative collective identity' in Botswana (Hirschl, 2008: 98).

The widespread initial 'expectation [was] that land rights would be introduced into the case as a more explicit claim for ownership, not only for lawful occupation'; a direct challenge to the government's oft-repeated view that 'all Batswana are indigenous to the country' (Saugestad, 2011: 45). The litigants' final list of demands was, however, more modest (at least at first glance). They asked the court to rule on four issues; firstly, if cutting-off services to the CKGR was 'unlawful and constitutional'; secondly, if government had to restore those services; thirdly, if the applicants had been in lawful possession of their lands before 2002, and deprived of them without consent; and, fourthly, if it was 'unlawful and constitutional' to refuse to issue special game licenses and permits to the enter the CKGR (*Sesana v The Attorney General*, 2006: judgement of Dibotelo, paragraph 3)[6].

There were a number of striking aspects of how the court handled this case. The first was that the state, despite being confident of winning within three months, ended up suffering a humiliating defeat two years later. The High Court found in its favour only on the constitutionality of cutting-off and failing to restore services. Just as strikingly, however, every issue was decided upon differently by the three judges' separate opinions. As in *Campbell*, that is, the judges were presented with a range of legally acceptable options. Easily the most dramatic of their conclusions was Judge Dow's finding that, for the first time in the country's history, the government should be ordered to treat different ethnic groups differently. Finding that the (locally controversial) international law concept of 'indigenous peoples' was relevant to Botswana, she found that the 'Basarwa [San]':

> ‘belong to an ethnic group that is not socially and politically organised in the same manner as the majority of other Tswana-speaking ethnic groups and the importance of this is that programmes and projects that have worked with other groups in the country will not necessarily work when simply cut and pasted to the Applicants’ situation’ (*Sesana v The Attorney General*, 2006: judgement of Dow, paragraph 186).

These findings were accompanied by forthright criticisms of the executive:

> ‘this is a case that questions the meaning of ‘development’ and demands of the respondent to take a closer look at its definition of that notion. One of colonialism’s greatest failings was to assume that development was, in the case of Britain, Anglicising, the colonised [...] Botswana has a unique opportunity to do things differently’ (*Sesana v The Attorney General*, 2006: judgement of Dow, paragraph 272).

Backlash

In the decade since the case, however, there has been very little indeed that could be characterised as compliance. At most, the government has responded with ‘restrictive interpretation[s]’ and ‘considerable ... foot-dragging’ (Saugestad, 2011: 50). It announced that only named applicants could return to the CKGR without permits, and

even they would need identity documents. Domestic animals and permanent structures were banned. Water from outside would only be allowed if transported at the applicants' expense. And applications for game licenses would need individual assessment. As of March 2012 none had been granted (Zips-Mairitsch, 2013: 354-6). All these instances of 'deliberately failing to abide by court rulings' were, moreover, accompanied by the 'bypassing [of] judicial institutions as channels of adjudication': another practice that Vondoepp and Ellett (2011: 152) classify as an 'institutional assault' on the judiciary. Under new President Ian Khama (from 2008) the government declared its openness to 'dialogue' with the *Sesana* applicants, but only on condition that 'outsiders' were not involved - a process failing to yield any significant results (Saugestad, 2011: 51-2; Zips-Mairitsch, 2013: 357-8). Dramatically, moreover, given the value it attaches to its international image, the government has been criticised for non-implementation of *Sesana* and its successor lawsuits by the UN Special Rapporteur on the Rights of Indigenous Peoples (in 2007 and 2010), the UN Special Rapporteur on the Right to Food (in 2007), the UN Human Rights Committee (in 2008), the UN Committee on the Elimination of Racial Discrimination (in 2010), the United States (in 2013), and, in 2014, the UN Special Rapporteur on Cultural Rights (Survival International, 2016). Unsurprisingly, however, given the government's well-known sensitivity to criticism on this score, this condemnation has proved largely counter-productive (Saugestad, 2011).

There has also been some speculation in Botswana that backlash against *Sesana* has also been (at least partially) responsible for 'personnel manipulation' and the 'packing [of the] court with supporters while purging it of opponents' (VonDoepp and

Ellett, 2011: 152-3). Opposition politicians certainly cited *Sesana* when questioning if Unity Dow had really retired from the court in 2008, or whether she had been 'pushed'. 2010, similarly, saw the elevation to Chief Justice of Maruping Dibotelo, the only *Sesana* judge who had found for the government on all counts, and who had also presided over the initial case which the applicants were appealing against (a procedural irregularity)[7]. Less speculatively, non-compliance with CKGR rulings has been one of the foremost charges that the organised legal profession has levelled against the government over the last six years; a period which has seen the Law Society of Botswana agitate for constitutional reform and transparent judicial appointments, all against a background of increasingly authoritarian rule (see Good, 2010).

Analysis

This new Botswanan debate over constitutionalism was already reflected in the three separate *Sesana* opinions. Not only did the judges reach different conclusions, but they appealed to very different legal constituencies. Justice Dibotelo, perhaps unsurprisingly, made reference almost exclusively to Botswanan positive law. Justice Mpaphi Phumaphi, meanwhile, did censure the executive (albeit more cautiously than Justice Dow), basing his reasoning on decisions made by other Commonwealth courts. His decisive ruling on the issue of services, for example, was grounded in the doctrine of legitimate expectations. This doctrine was invented by the famously liberal British jurist Lord Denning in 1969, intended to curtail the discretionary power of bureaucracy. And its relevance mobilised longstanding common law networks around *Sesana*.

Christopher Forsyth, notably, a leading authority on administrative law in Commonwealth jurisdictions, delivered a lecture at the University of Botswana just months before the judgement in *Sesana* was due. Concerned by 'activist' trends elsewhere, he devoted his lecture to 'Some Pitfalls for Botswana to Avoid'. It warned against expanding the doctrine of legitimate expectations into an 'inchoate substitute for fairness' (Forsyth, 2006: 5). Phumaphi then referenced Forsyth in *Sesana* to make exactly this argument, re-affirming more established common-law precedent (*Sesana v The Attorney General* 2006, judgement of Phumaphi, paragraphs 55-6).

On the question of lawful occupation, by contrast, Phumaphi found in the applicants' favour. He did this, once again, by referring to common law jurisprudence, citing the Australian High Court's most famous judgement: *Mabo and Others v The State of Queensland* (1992). This ruling had held that 'aboriginal title' had not been extinguished when the British Crown claimed possession of relevant lands. It found that the infamous doctrine of *terra nullius* (no-one's land), which the British had used to justify their claims, no longer accorded, in Justice Brennan's words, with 'the expectations of the international community' and the 'contemporary values of the Australian people'. Like *Sesana* in Botswana, *Mabo* signalled (some) Australian judges' desire to reconcile common-law jurisprudence with the new rights-based brand of constitutional interpretation characteristic of the 'global community of law' (for analysis Ng'ong'ola, 2007).

In contrast to Justice Phumaphi, but like Judge Pillay in *Campbell*, Unity Dow

justified her decisions on the basis of international human rights - looking far beyond the bounds of the common-law world. She justified this 'activist' approach by citing U.S. Supreme Court doctrines of 'generous construction' previously referenced in *Dow v the Attorney General* (1991). This earlier case had been the best-known in Botswana's legal history, and had featured Dow herself as litigant. Demanding citizenship rights for her children (her husband was from the United States), Dow publicly described this action as a 'test case' with broad implications for 'implementing change' for African women. It was also the first civil action in Botswana to allege that parliament had violated human rights and exceeded its constitutional powers (Pfotenhauer and Dow, 1991). Now, in *Sesana*, Dow made the similarly path-breaking finding that 'the Applicants belong to a class of peoples that have now come to be recognized as 'indigenous peoples''; an opinion justified solely by reference to a leading UN expert. On the issue of service restoration, moreover, Dow interpreted the doctrine of legitimate expectations in precisely the 'activist' manner that Christopher Forsyth had warned against (for a common-lawyer's critique Ng'ong'ola, 2007: 109-11).

Like Judge Pillay, Dow had long been a part of international human rights networks. In fact she was esteemed as something of a judical superstar (see Ginsburg and Garoupa 2015, 39). In the 1980s, after legal training in Edinburgh, she had been responsible for creating many of Botswana's first organisations dedicated to women's rights (Bauer and Ellett, 2015: 43). This helped attract support from Swedish donors and international NGOs for her 1991 'test case'. Then, in her subsequent career on the bench, as summarised by one *Sesana* lawyer, she became a judge 'willing to listen to

arguments that to some conservative judges would seem to be outrageous. In the CKGR case, I think she brought it home in the plainest manner' (in Segwai, 2008). *Sesana* did indeed help signal Dow's membership of the 'global community of law'. After retiring in 2008 she received the Legion d'Honneur and was invited to teach indigenous rights at Columbia Law School. By far the most dramatic evidence for Dow's attentiveness to global rights audiences comes, however, from her 2006 novel *The Heavens May Fall*. Written, rather astonishingly, while she was adjudicating *Sesana*, the book concludes by attacking Botswana's denial of rights to indigenous peoples; sees its main character (a young female human rights lawyer) confront the Chief Justice, alleging bias on the High Court; has her deliver a speech at the Law Society's Annual Dinner criticising Botswana's reputation as 'a shining example of democracy in Africa'; and covers numerous other themes from the global human rights script, including Darfur, HIV/AIDS, sexual consent, and violence against women.

Whilst *Sesana* (albeit to a lesser extent than *Campbell*) may have deepened threats to the institutional integrity of the Botswanan judiciary, it hardly damaged Dow's own relations with the executive. Returning to Botswana, Dow actually joined the ruling Botswanan Democratic Party (BDP) in 2012, amid some controversy. The political opposition speculated that the BDP had been in contact with Dow whilst she was still on the bench - reacting, they implied, to her famously independent judgements. The government, more certainly, has sought to use Dow's global cultural capital, enhanced by *Sesana*, to re-legitimise its rule. Under President Khama she has been the *only* politician to benefit from laws allowing women to be appointed to parliament as

Specially Elected Members (Bauer and Ellett, 2015: 43). Her recent trajectory, in short, neatly illustrates how judges can be inserted in domestic and global networks that not only co-exist but interact (Dezalay, 2015: 19-20). And it confirms how ‘a mix of ideas and benefits shapes most judicial networks’, notably ‘when benefits include career advancement or public esteem’ (see special issue introduction).

Conclusion

My goal in this article has been to re-invigorate the debate surrounding Anne-Marie Slaughter's ‘global community of law’. I have argued that this inter-judicial network may be of most influence in high-profile human rights lawsuits adjudicated by courts seeking the esteem of their foreign and international counterparts. This claim has been made by probing the plausibility of a central assumption in strategic models of judicial decision-making: that judges seek to protect the institutional integrity of their courts. In both my case studies executive signalling towards the court in fact actually failed to exercise a ‘chilling effect’ on judges’ decision-making. Yet backlash was both predictable and easily avoidable through legal means. Individual judges’ decisions certainly varied in both cases. They ranged from wholesale agreement with the government’s position (Justice Dibotelo), to wholesale rejection of government visions for ‘formative collective identity’ (Judge Pillay and Justice Dow). I have provided interpretive evidence indicating how a desire for esteem from global judicial networks could function as an independent variable here, helping explain this variation. Communicating through personal contacts in judicial networks, and via the citation of foreign court decisions, Southern African judges have made (ultimately dangerous)

claims to membership of an international human rights guild.

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1 I have followed both cases closely since 2011, and have conducted twenty interviews with their observers and participants (in Gaborone, Windhoek, Tshwane/Pretoria and Harare; August-September 2011, and April-May 2012).

2 Michael Kirby (2007: 38), a former Chief Justice of the Australian High Court - whom Slaughter and others often quote - has even described one 1988 conference as an 'epiphany', revolutionising his views about international law's domestic role. When Slaughter's critics acknowledge 'exceptions to the practical requirement that domestic courts address their opinions to those will be bound by them' they cite Kirby's 'outlier interpretations' of human rights in Australian law, which 'were written less for other Australian justices, or even future generations of Australians, than for a global audience' (Law and Chang, 2011: 529, n.18).

3 For details of network relationships see the earlier version of this paper cited in the acknowledgements.

4 Two months previously SALC - supported by the ICJ and others - had approached the Commission asking for a simple advisory opinion: a move designed to minimise confrontation between member states and new institutions.

5 Although the German Government and EU paid operating costs and five judicial positions, there is little evidence that decision-making strategically catered to donor preferences. My interviews with diplomats suggested donors were consistently sceptical of *Campbell*. Donor funding, meanwhile, continued nonetheless (Hulse and van der Vleuten, 2015).

6 The judgement is available at: http://www1.chr.up.ac.za/index.php/browse-by-country/botswana/1118.html.

7 Despite critics in the Botswana Law Society using this occasion to criticise Dibotelo's 'anti human-rights' mindset in *Sesana*, seniority was (at least then) the executive's primary consideration when making such appointments.